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No. 90-1158

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SERV-A-PORTION, INC., and DI GIORGIO CORPORATION,
Petitioners,

—v.—

J.F. FEESER, INC., and JUNIATA FOODS, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Is there any basis for this Court to grant certiorari to review a fact-bound, interlocutory denial of summary judgment where, as here, the Court of Appeals applied black letter principles of law established by the decisions of this Court to hold that plaintiffs had presented sufficient evidence upon which a reasonable jury could find the existence of competitive injury within the meaning of § 2(a) of the Robinson-Patman Act, and actual injury under § 4 of the Clayton Act?

LIST OF AFFILIATED CORPORATIONS

Pursuant to Rule 29.1 of the Rules of the Court Respondents submit the following statement: Named plaintiffs J.F. Feeser, Inc. and Juniata Foods, Inc. are commonly owned corporations and have no parents or subsidiaries. Subsequent to the institution of this lawsuit J.F. Feeser, Inc. has changed its name to Feesers, Inc.

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COUNTERSTATEMENT OF THE CASE

The Facts

In seeking this Court's review of an interlocutory decision wherein the Third Circuit found that plaintiffs had presented sufficient evidence to warrant a jury's consideration of their Robinson-Patman Act claims, petitioners fundamentally mischaracterize the factual record below. The following is a summary of the actual record evidence as found by the Third Circuit.

In this action, respondents, J.F. Feeser, Inc. and Juniata Foods, Inc. (collectively "Feeser" or "plaintiffs") seek, *inter*

alia, both injunctive relief and damages for price discrimination in the sale of portion control products engaged in by petitioners Serv-A-Portion, Inc. and Di Giorgio Corp. (collectively "Serv") in violation of § 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a).[1]

The amount and degree of the price discrimination was substantial and sustained, as evidenced by a pricing analysis prepared by plaintiffs' expert economist, Dr. Robert Larner, which he compiled from thousands of invoices and other pricing documents used by petitioners in connection with the sale of Serv portion control products to plaintiffs and several of their competitors. (*See* 1986 Larner Aff., A.XI-6384-497; 1988 Larner Aff. ¶¶ 28-31, A.V-2762-64 and Exhs. B and C, A.V-2790-91). As the Third Circuit recognized, this analysis revealed that, over a four-year period, petitioners charged plaintiffs substantially more than their competitor Weis Food Service ("Weis") on contemporaneous sales of identical products. For example, in 1983, plaintiffs paid a higher price than Weis on approximately 63% of the comparable transactions, with the price differential averaging 22%. (Pet. App. 28a-29a, 41a-42a, 909 F.2d at 1538-39, 1544). A similar one-year analysis of Serv pricing to two of plaintiffs' other competitors, Tartan Foods ("Tartan") and Sky Brothers ("Sky"), revealed an even greater degree of discrimination, averaging 20% on 79% of plaintiffs' comparable purchases with Tartan and 24% on 75% of comparable purchases with Sky. *Id.*[2] Both the Court of Appeals and the district court found it to be an *uncontradicted* fact that the institutional

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1 Petitioners' assertion that only damage claims remain in the case (Pet. 2 n.1) is inaccurate. Petitioners have filed a motion to dismiss plaintiffs' claims for injunctive relief, based on an argument that the Third Circuit held these claims to be "moot," but plaintiffs have strenuously opposed this motion on the grounds, *inter alia*, that the Third Circuit made no such holding and, indeed, that the issue of injunctive relief was not even before the Third Circuit.

2 The reason why this analysis was for just a single year was due to discovery limitations imposed by the district court at petitioner's request. (Pet. App. 7a, 909 F.2d at 1528).

food distribution market in which plaintiffs do business is highly competitive. In particular, it is characterized by low profit margins and customers who are extremely sensitive to even minute differences in price. (Pet. App. 5a, 28a, 30a-31a, 909 F.2d at 1527, 1538-39; Pet. App. 56a).

No credence can be given to petitioners' assertion that "the uncontradicted evidence demonstrated that Feeser was not the victim of any substantial or prolonged difference in Serv pricing." (Pet. 4). Indeed, petitioners do not contest the facts in Dr. Larner's pricing analysis, they merely assert that the analysis shows that plaintiffs occasionally received more favorable prices than their competitors. (Pet. 4). This assertion cannot negate the overall pattern of price discrimination against plaintiffs, since, as the Court of Appeals observed, plaintiffs' competitors received more favorable prices, in far larger amounts with far greater frequency than did plaintiffs. (Pet. App. 29a, 41a, 909 F.2d at 1538, 1544).[3]

In addition to the evidence of substantial and sustained price differentials in favor of plaintiffs' competitors, the record contains significant probative evidence of plaintiffs' lost sales and profits caused by the discrimination. Thus, as described by the Court of Appeals below, this evidence consists of, among other things: (i) testimony by twenty of plaintiffs' employees identifying numerous specific instances at more than 80 different customers in which plaintiffs either lost accounts or were forced to greatly reduce their prices because of their inability to match the prices on Serv products being offered by favored competitors Weis, Tartan or Sky (*see* Pet. App. 23a-25a, 909 F.2d at 1235-36); and (ii) testimony from a number of plaintiffs' customers attesting to

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3 Petitioner also asserts it to be "uncontradicted" that "[d]uring 1985 the average difference in price of Serv products sold to Feeser and those sold to Weis amounted to only $.002 per case." (Pet. 5). This figure, which was vigorously contested below, is based on a calculation by Serv's counsel which has no comprehensible methodology, appears nowhere in the evidentiary record, and was not even considered by the district court below, whose decision petitioner seeks to reinstate. It thus hardly constitutes evidence, let alone "uncontradicted evidence," as to the degree of the discrimination in even that one year.

specific instances in which these customers either switched their Serv business from plaintiffs to a favored competitor due to the lower prices being offered, or forced plaintiffs to drastically lower their prices to match these competitors. (Pet. App. 25a-26a, 909 F.2d at 1537). In addition, contrary to petitioners' assertions (*see* Pet. 23 n.37), there was substantial record evidence that the price discrimination was passed on to customers by the favored competitors, including the direct testimony of Weis's General Manager, Mr. Steven Bowers, and the expert analysis of Weis's pricing by Dr. Larner. (Pet. App. 30a n.15, 909 F.2d at 1539 n.15).

In order to confirm that Serv's price discrimination had an adverse impact on plaintiffs' sales and profits, plaintiffs' expert economist performed several additional analyses based on plaintiffs' sales records and the pricing and transactional documents produced by Serv and Weis. These analyses all supported Dr. Larner's opinion that plaintiffs suffered significant lost sales and profits as a result of the discrimination.[4] Finally, there is significant direct evidence in the record that not only were plaintiffs injured by petitioners' discrimination, but that other disfavored competitors were injured as well. (See Pet. App. 10a, 909 F.2d at 1529; Straw Dep. A.VII-3848-50; Straw Aff. ¶¶ 8-10, A.VII-4066; Spagnola Aff. ¶¶ 5-7, A.V-2950-51; Supp. Spagnola Decl. ¶¶ 6-7, A.V-2954).

Petitioners' "Statement of Facts" does not advert to any of this evidence. Instead, petitioners assert: (i) that "Feeser

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4 *See* Larner Aff. ¶¶ 41-51, A.V-2767-73 and Exhs. D-G, A.V-2796-2800. The probative value of these analyses is reinforced by the fact that they each employ entirely different methodologies yet still demonstrate the same result. One analysis is a classic "before and after" study showing the negative impact of petitioners' price discrimination on plaintiffs' overall Serv sales (Larner Aff. ¶¶ 41-43, A.V-2767-69 and Exh. D, A.V-2796), the next compares plaintiffs' margins on Serv products with those of favored competitor Weis and finds that plaintiffs' Serv margins were severely depressed (Larner Aff. ¶¶ 46-50, A.V-2770-72 and Exhs. E and F, A.V-2797-99), and the third compares plaintiffs' margins on Serv products with their margins on products having comparable competitive attributes, but as to which there was no discrimination, also finding a significant margin depression. (Larner Aff. ¶ 51, A.V-2272-73 and Exh. G, A.V-2800).

was at most able to show lost sales at only 18 . . . accounts" (Pet. 5); and (ii) that Feeser "took business, including Serv business, away from its competitors" at 80 accounts. (Pet. 4). This is a complete distortion. Thus, in support of the "18 accounts" figure, petitioners cite only to the district court's opinion, which was found by the Third Circuit to have erroneously excluded extensive probative evidence of plaintiffs' lost sales and profits[5] in additional accounts.[6] Similarly, petitioners' assertion that "80 accounts" switched their business to plaintiffs is not supported in the record, nor is it linked to the Serv products at issue.[7]

Finally, petitioners' "Statement of Facts" is replete with citations to purported "uncontradicted evidence" that plaintiffs in particular, and the institutional food distribution market in general, were successful during the period of the discrimination. (Pet. 3-4). Far from being uncontested, this "evidence", which has as its sole source the declarations of petitioners' purported expert, Mr. Donald Karas, and Serv's controller, Mr. Timothy Cruise, was vigorously disputed below. Plaintiffs devoted substantial sections of their opposition to Serv's summary judgment motion to challenging and debunking virtually every proposition in Mr. Karas's declara-

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5 Petitioner raises no challenge to the appeals court's evidentiary rulings.

6 The evidence actually shows at least 80 identifiable customers at which plaintiffs lost sales or profits as a result of the price discrimination (*see* A.V-2918-48, A.VI-2958-3209, A.IX-4894-5001, A.X-5182-5394), as well as even greater losses, reflected in plaintiffs' expert's study, that cannot easily be attributed to specific accounts (*See* Larner Aff. ¶¶ 52-53, A.V-2773-74).

7 For example, petitioners cite to the deposition testimony of one of plaintiffs' salesmen, R. Fuller; however, all the cited excerpts show is that Mr. Fuller was successful in winning some business away from Weis, but there is nothing in the record to indicate whether he obtained *Serv* business (Fuller Dep. A.III-1370-72). Likewise, the cited excerpt from Mr. Bowers's declaration (Bowers Decl. ¶ 6, A.III-1221-22) does not indicate whether Weis lost any *Serv* business to plaintiffs. Petitioners' citation to the Blew deposition is even more disingenuous, since even the district court below found that Mr. Blew's testimony was probative of *plaintiffs' lost business*. (See Pet. App. 62a).

tion and argued that his entire testimony was inadmissible lay opinion evidence.[8] As to the declaration of Serv's controller, plaintiffs both moved to strike it as improperly submitted (see A.V-2738-39), and offered their own expert's testimony in refutation (*see* Larner Aff. ¶ 68, A.V-2684-85).[9]

The Decisions Below

The district court granted petitioners' motion for summary judgment against plaintiffs' claims under § 2(a) and 2(f) of the Robinson-Patman Act, on the ground that plaintiffs had presented insufficient evidence to establish genuine issues of material fact as to: (1) competitive injury under § 2(a) of the Robinson-Patman Act, and (2) actual damage to plaintiffs under § 4 of the Clayton Act.[10] The district court also granted petitioners' motion to dismiss plaintiffs' claims under § 1 of the Sherman Act (Pet App. 78a-86a), to dismiss pendant state law claims and claims against Weis (Pet. App. 87a), and to dismiss plaintiff Juniata for lack of standing

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8 *See* A.V-2695-2719. For example, when asked at his deposition to explain the basis of a key part of his methodology for a particular growth rate calculation, Mr. Karas conceded: "I'm not an economist, and I'm not a mathematician . . . *I did it as a lay person trying to figure out the market.*" (Karas Dep. A.X-5728). Similarly, in explaining the basis for his key estimate of Weis's growth rate, Mr. Karas testified: "*I estimated based on the psyche in my mind*" (*id.* at 5462) and "*I used what I felt was a psychological estimate*" (*id.* at 5466). Indeed, plaintiffs' expert economist testified that the Karas declaration was wholly unreliable (*see* Larner Aff. ¶ 67, A.V-2781-83).

9 The district court did not reach plaintiffs' motions to strike because it did not rely on either the Karas or Cruise testimony as a basis for its decision. (Pet. App. 57a-59a, 87a).

10 The procedural background and legal rationale of the district court's decision is well summarized in the Third Circuit's opinion. (*See* Pet. App. 6a-12a, 909 F.2d at 1528-30). It should be noted that full and complete discovery was not taken prior to Serv's summary judgment motion, since, pursuant to Serv's prior requests, the district court had placed substantial limits on relevant discovery from third parties and on the "issues" as to which discovery could be taken. (*See* A.I-105-06; A.I-371-74).

(Pet. App. 60a n.2), all of which rulings were reversed by the Court of Appeals, but which are not challenged in the petition.

On appeal from this decision, the Third Circuit conducted a de novo review of the extensive summary judgment record and applied the well-established legal principles established by this Court for considering a summary judgment motion,[11] for determining the competitive injury element of a secondary line price discrimination claim[12] under § 2(a) of the Robinson-Patman Act,[13] and for finding actual injury under § 4 of the Clayton Act in a Robinson-Patman Act case.[14] The Court of Appeals thus rejected petitioners' argument—in direct conflict with all Supreme Court authority—that purported evidence of the overall competitive health of the institutional food distribution industry conclusively precluded plaintiffs from establishing either competitive or actual injury.[15]

Instead, upon review of the extensive testimony by plaintiffs' salesmen[16] and customers, as well as plaintiffs' expert's studies, the Court of Appeals concluded that plaintiffs had presented evidence "demonstrating actual instances of lost sales because of its inability to match its competitors' prices"

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11 *See Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986).

12 Secondary line claims involve price discrimination by a seller to competing buyers. (Pet. App. 3a, 909 F.2d 1526).

13 *See Texaco, Inc.* v. *Hasbrouck*, 110 S. Ct. 2535 (1990); *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983); *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948).

14 *Texaco, Inc.* v. *Hasbrouck, supra*; *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981).

15 The district court below had likewise rejected this argument by petitioners (*see* Pet. App. 57a-60a).

16 Much of this testimony had not been considered by the district court due to evidentiary rulings the Third Circuit found to be erroneous. (Pet. App. 22a n.11, 24a n.12, 909 F.2d 1524-5 nn.11, 12).

sufficient to support a jury finding that competitive injury had occurred. (Pet. App. 22a-27a, 909 F.2d at 1535-38). The Court of Appeals also found that the evidence of four years of price discrimination contained in the pricing analysis prepared by Dr. Larner, as well as the uncontested fact that the institutional food distribution business was highly competitive and price sensitive, evidenced a sufficient degree and duration of price discrimination to support an inference of competitive injury under the standard established by this Court in *Morton Salt*, and reaffirmed in *Falls City* and *Hasbrouck*. (Pet. App. 27a-31a, 909 F.2d at 1538-39). Finally, the Court of Appeals applied the well-established principles set forth by this Court in *Truett Payne* to determine that plaintiffs had adduced sufficient evidence of injury to themselves caused by the discrimination to present a genuine issue of fact as to their damage claims under § 4 of the Clayton Act. (Pet. App. 31a-33a, 909 F.2d at 1539-40).

REASONS FOR DENYING THE WRIT

1. Petitioners seek to have this Court reassess the voluminous (though incomplete) evidentiary record in this case[17] in order to conclusively resolve in their favor factual issues which a unanimous Court below found to be genuinely disputed. The extremely fact-bound nature of the requested inquiry, as well as the interlocutory status of the case (with substantial discovery still to be completed), render it particularly unsuitable for review on certiorari. No significant legal issues are presented, indeed, much of the difference in the conclusions reached by the Court of Appeals and the district court can be explained by their different admissibility determinations. (*See* Pet. App. 22a-24a, nn.11, 12, 908 F.2d at 1535-36, nn.11, 12). The only real issue presented by the petition is thus what facts and inferences may be drawn from the admissible evidence. This is precisely the type of interlocu-

17 The Joint Appendix filed with the Court of Appeals consists of 11 volumes comprising over 6400 pages.

tory, fact-driven petition that is inappropriate for review by this Court.[18]

2. In an effort to manufacture legal issues worthy of consideration by this Court, petitioners assert that the standards applied by the Third Circuit for determining both "competitive injury" under § 2(a) of the Robinson-Patman Act and "actual injury" under § 4 of the Clayton Act "cannot be reconciled" and "are in conflict" with decisions of this Court and of other Circuits. (*See, e.g.*, Pet. 8-11). There are no such conflicts. Rather, the only conflict here is between well-established principles routinely applied by this Court in secondary-line Robinson-Patman Act cases and petitioners' own view of the law, which can be found neither in decisions of this Court nor in those of any other Circuit. Petitioners' contention that a conflict exists is based upon blatant mischaracterizations of both the record evidence and the law.

I. IN ASSESSING THE SUFFICIENCY OF PLAINTIFFS' EVIDENCE OF COMPETITIVE INJURY, THE THIRD CIRCUIT APPLIED THE WELL-SETTLED LEGAL STANDARDS ESTABLISHED BY THIS COURT

1. Petitioners' contention that the standard applied by the Third Circuit for assessing competitive injury is irreconcilable with the decisions of other Circuits or those of this Court is premised on petitioners' fundamental mischaracterization of the decision and evidence below. Thus, petitioners assert that, "the court below applied the Robinson-Patman Act as if it were a *per se* statute that is violated any time there exists the slightest difference in price between one purchaser . . . and another." (Pet. 9). This assertion is false.

The Third Circuit set forth no new or inconsistent standard for finding a genuine issue of secondary line competitive injury under the Robinson-Patman Act. Rather, it scrupulously applied the well-established standard, set forth by this

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18 *See United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts."); *See also Texas* v. *Mead*, 465 U.S. 1041 (1984) (Stevens, J.); *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508 (1924).

Court in cases such as *Texaco, Inc.* v. *Hasbrouck*, 110 S. Ct. 2535 (1990), *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983) and *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), in which secondary line "competitive injury" can be shown in either of two ways: (1) it may be inferred, under what has come to be known as the *Morton Salt* test, from proof of a substantial price discrimination between competing purchasers over time in a competitive industry, or (2) by direct evidence of lost sales or profits attributable to the discrimination. *Falls City*, 460 U.S. at 435; *Hasbrouck*, 110 S.Ct. at 2544.

After carefully evaluating the extensive evidentiary record below, the Court of Appeals found plaintiffs to have presented sufficient evidence to satisfy both tests. As to the *Morton Salt* test, the Court found that the pricing comparisons set forth in the report submitted by Dr. Larner, in conjunction with the undisputed evidence of low profit margins and price sensitivity, evidenced four years of price discrimination sufficient in degree and duration to support an inference of competitive injury. (Pet. 27a-31a, 909 F.2d at 1538-39). Petitioners' assertion that the price differences were "slight," "temporary" and "insubstantial" is thus controverted by the record evidence.[19] As to direct evidence of lost sales or profits caused by the discrimination, the Court of Appeals found that the testimony of plaintiffs' salesmen and customers recounting numerous specific instances in which plaintiffs lost sales to favored competitors Weis, Tartan and Sky, or had to greatly reduce their prices in an effort to match prices offered by these favored competitors, was sufficient direct evidence of lost sales and profits to support a finding of competitive injury. (Pet. App. 22a-27a, 909 F.2d at 1535-38).

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19 It should be noted that Dr. Larner's expert opinion that the price differentials reflected in his report were sufficient to support an inference of competitive injury (*see* Larner Aff. ¶¶ 32-33 A.V-2764) is unrebutted, as petitioner's purported expert, Mr. Karas, admitted he was not competent to render an expert opinion on this subject (*see* Karas Dep. A.X-5408, 5631).

2. Petitioner seeks to manufacture an intercircuit conflict from the Third Circuit's statement that in a secondary line Robinson-Patman Act case, "evidence of injury to a competitor may satisfy the component of competitive injury necessary to show a violation." (Pet. App. 21a-22a, 909 F.2d at 1535). This observation, however, is completely consistent with the statutory language and legislative history of the Robinson-Patman Act, as well as the controlling decisions of this Court. *See Hasbrouck*, *Falls City*, *Truett Payne*, *Morton Salt*. As this Court declared in the seminal *Morton Salt* case "[§ 2(a)] was intended to justify a finding of injury to *competition* by a showing of injury to the *competitor* victimized by the discrimination." 334 U.S. at 49 (emphasis added). In this regard, the distinction between proof of injury to competition in secondary and primary line Robinson-Patman Act cases has been expressly recognized by this Court, *see Texaco, Inc.* v. *Hasbrouck*, 110 S.Ct. at 2543 n.15; *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 552 n.21 (1960), by the other circuits, *see Borden Co.* v. *FTC*, 381 F.2d 175, 178 (5th Cir. 1967); *Foremost Dairies Inc.* v. *FTC*, 348 F.2d 674, 678 (5th Cir.) *cert. denied*, 382 U.S. 959 (1965), by the Federal Trade Commission, *see Boise Cascade Corp.*, 5 Trade Reg. Rep. (CCH) (1990-2 Trade Cas.) ¶ 22,902 at 22,580-81 nn.9, 10 (FTC Nov. 1, 1990), and by learned commentators, *see* E. Kinter, *A Robinson-Patman Act Primer* 145 (2d ed. 1979). Indeed, the secondary line cases recognizing that competitive injury may be inferred from injury to a competitor are legion.[20]

Obscured by petitioners' talismanic repetition of the inapposite maxim that "the purpose of the antitrust laws is to protect competition not competitors" is the absurd proposi-

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20 *See, e.g., Hasbrouck*, 110 S. Ct. at 2544, *aff'g Hasbrouck* v. *Texaco, Inc.*, 842 F.2d 1034 (9th Cir. 1987); *Falls City*, 460 U.S. at 437-38; *Morton Salt*, 334 U.S. at 49-50; *See also Alan's of Atlanta, Inc.* v. *Minolta Corp.*, 903 F.2d 1414, 1418 (11th Cir. 1990); *Monahan's Marine, Inc.* v. *Boston Whaler, Inc.*, 866 F.2d 525, 528-29 (1st Cir. 1989); *Best Brands Beverage* v. *Falstaff Brewing Corp.*, 842 F.2d 578, 585 (2d Cir. 1987); *Chrysler Credit Corp.* v. *J. Truett Payne Co.*, 670 F.2d 575, 580 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982).

tion that it would have this Court endorse—that even if a plaintiff with a secondary line Robinson-Patman act claim satisfies both the *Morton Salt* test of showing substantial price discrimination over time, and presents direct evidence of lost sales and profits resulting from the discrimination, summary judgment should be granted to a defendant unless the plaintiff can also show Sherman Act type injury to competition in a relevant market. There simply are no cases which support this proposition.[21] To the contrary, decisions like *Morton Salt* hold the exact opposite.[22]

3. Nor is there any substance to petitioners' contention that decisions from other Circuit Courts cannot be reconciled with the decision below.[23] In *Boise Cascade Corp.* v. *FTC*, 837 F.2d 1127 (D.C. Cir. 1988), on which petitioners heavily rely, the Court expressly acknowledged the continuing viability of the *Morton Salt* inference. *Id.* at 1139, 1146 n.16. The case arose not in the context of a summary judgment motion, but on appeal from the fact finder's determination that the *Morton Salt* inference was established and a violation therefore proven. The Court remanded the case for further fact

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21 In *Hasbrouck* v. *Texaco, Inc.*, 842 F.2d 1034, 1040 (9th Cir. 1987), *aff'd*, 110 S. Ct. 2535 (1990), the Ninth Circuit rejected the very argument advanced here by petitioner—that plaintiff only presented evidence reflecting injury to itself rather than "competition." The Court noted that "the oft-quoted chestnut distinguishing between protecting competition and protecting competitors has been misconstrued with some regularity by antitrust defendants who appear to argue in all types of antitrust cases that the effect of unlawful conduct on competitors is irrelevant."

22 For example, in *Morton Salt*, discrimination in the price of salt sold to grocers obviously could not affect the overall health of the grocery business but nevertheless provided a basis for finding competitive injury under § 2(a) of the Robinson-Patnam Act. 334 U.S. at 48-49.

23 The FTC has recently noted that its own research has "found no authority, in the four decades since *Morton Salt*, for the proposition that one does not incur . . . secondary line injury despite paying substantially more than a competitor for goods of like grade and quality over a prolonged period in an industry with low profit margins and keen competition." *Boise Cascade Corp.*, 5 Trade Reg. Rep. (CCH) (1990-2 Trade Cas.) ¶ 22,902 at 22,583.

finding, due to the FTC's failure to consider any of the evidence offered by the defendant in rebuttal of the *Morton Salt* inference. This excluded evidence purportedly showed a lack of injury to the victims of the discrimination.[24] Significantly, on remand, after considering the entire record, the FTC ultimately found the required injury to competition. *Boise Cascade Corp.*, 5 Trade Reg. Rep. (CCH) (1990-2 Trade Cas.) ¶ 22,902 (FTC Nov. 1, 1990).[25] Here, the Court of Appeals below has likewise remanded a case with a disputed record on competitive injury for resolution by the fact finder, applying the *Morton Salt* and *Truett Payne* standards.

4. Similarly, the other purportedly "irreconcilable" cases cited by petitioners do not involve differing rules of law, but rather the application in various factual and procedural contexts of the same well-settled standards applied by the Court of Appeals below. For example, in *Motive Parts Warehouse* v. *Facet Enterprises*, 774 F.2d 380 (10th Cir. 1985), the court declared that "[i]t was for the jury to decide whether the competitive injury element . . . had been met," *id.* at 395, which is precisely the conclusion of the Court of Appeals below. In *Foremost Pro Color, Inc.* v. *Eastman Kodak Co.*, 703 F.2d 534 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984), the court simply granted defendant's motion to dismiss a § 2(a) claim where plaintiff failed to allege facts from which the *Morton Salt* inference could be drawn, *i.e.*, that

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24 In *Boise Cascade*, defendant's evidence also arguably tended to show an overall healthy market structure; however, the Court of Appeals expressly noted, in accordance with the well-settled principles discussed above, that the type of market structure analysis of "competition" employed in the context of other antitrust laws (such as § 7 of the Clayton Act) was inappropriate to a secondary line Robinson-Patman Act case. 837 F.2d at 1145 n.15.

25 Citing *Morton Salt*, the Commission noted that evidence of the overall success of the disfavored competitors had little relevance where the products in which the discrimination occurred constituted but a fraction of their overall business. *Id.* at 22,588. It also observed that just because the disfavored competitors enjoyed business growth during the period of the discrimination, that did not preclude a finding of competitive injury, since, absent the discrimination, they could have enjoyed even greater success. *Id.* at 22,589.

the alleged discrimination was sufficient to affect resale prices or to otherwise provide plaintiff's competitors with a significant competitive advantage. *Id.* at 548.[26]

In *American Oil Co.* v. *FTC*, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964), the reviewing court found that "temporary and transient" discrimination over a 17 day period was not sufficient to establish the *Morton Salt* inference, and further found that the business losses suffered by the disfavored purchasers were not caused by this transient discrimination. The Court of Appeals here applied this same standard to find that four years substantial discrimination in a price sensitive industry, significant direct evidence of lost sales and profits, combined with expert economic testimony, was more than sufficient to create a jury question as to competitive injury in a secondary line Robinson-Patman Act case.[27]

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26 Indeed, in light of its decision in *Hasbrouck*, there can be no question that the Ninth Circuit applies a competitive injury standard that accords with that applied by the Court of Appeals below. *See* 842 F.2d at 1040-41.

27 The other secondary line cases cited by petitioners likewise turn on the facts, not differing views of the law. *Chrysler Credit Corp.* v. *J. Truett Payne Co.*, 670 F.2d 575 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982) and *Richard Short Oil Co.* v. *Texaco, Inc.*, 799 F.2d 415 (8th Cir. 1986) were cases where plaintiffs failed to present any evidence to establish the *Morton Salt* inference and where it was further shown that their injuries had causes other than the alleged discrimination. In *Black Gold Ltd.* v. *Rockwool Industries, Inc.*, 729 F.2d 676 (10th Cir. 1984) plaintiff did not even attempt to establish the *Morton Salt* inference. Moreover, given the unusual market dynamic (prices to end users were set at a uniform level by a public utility sponsoring the marketing program in which the alleged violation occurred), the court found it impossible for the favored competitor to divert sales from plaintiff by offering a lower price.

The remaining purportedly conflicting cases from other Circuits cited by petitioner concern primary line injury and are therefore wholly inapposite, as discussed above, to a secondary line case. *See Henry* v. *Chloride, Inc.*, 809 F.2d 1334 (8th Cir. 1987); *Lomar Wholesale Grocery, Inc.* v. *Dieter's Gourmet Foods, Inc.*, 824 F.2d 582 (8th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988); *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

5. Finally, even if the issue of finding secondary line competitive injury from evidence of lost sales and profits suffered by a single competitor as a result of discrimination was not well-settled, which it is, that question still would not be presented by the summary judgment record before the Court below. For, in this case, there was not only evidence of lost sales and profits suffered by the plaintiffs, but also evidence of lost sales and profits suffered by at least two other disfavored competitors who were also injured by Serv's discrimination. *See supra* p. 4.

II. IN FINDING THAT PLAINTIFFS' EVIDENCE OF CAUSATION AND INJURY WAS SUFFICIENT TO CREATE A GENUINE ISSUE OF FACT UNDER SECTION 4 OF THE CLAYTON ACT, THE THIRD CIRCUIT ONCE AGAIN APPLIED WELL-SETTLED PRINCIPLES ESTABLISHED BY THIS COURT

1. In a further effort to manufacture a legal issue worthy of certiorari, petitioners contend that, in finding sufficient evidence of causation and injury to present a jury question under § 4 of the Clayton Act, the Third Circuit applied the "automatic damage" rule rejected by this Court in *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981).[28] The Court of Appeals did no such thing. Rather, it expressly noted that *no* automatic damage rule could be applied and instead followed the standards set forth by this Court in *J. Truett Payne* to find that plaintiffs had presented sufficient evidence of a causal connection between Serv's price discrimination and actual lost sales and profits suffered by plaintiffs to raise a genuine issue of actual injury under § 4 of the Clayton Act. (Pet. App. 31a-33a, 909 F.2d at 1539-40).

Only recently, in *Texaco, Inc.* v. *Hasbrouck*, this Court again reaffirmed its "traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust

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28 Under this rejected theory, a plaintiff was "automatically" entitled at a minimum to damages in the amount of the price discrimination without having to prove its actual injuries. 451 U.S. at 561.

injury." 110 S. Ct. at 2551. Elaborating on this standard, the Court quoted the oft cited passage from *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946), stating:

> [D]amage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the fact-finder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs."

There is thus no conflict at all between the § 4 Clayton Act standard set forth by this Court and that applied by the Court of Appeals below.

2. Indeed, petitioners' challenge to the injury standard applied by the decision below is not really a legal dispute, but a factual one, based upon petitioners' distorted view of the record evidence. Thus, petitioners baldly assert that there was "no evidence of causation" (Pet. 23) and that there was no evidence that the favored competitors "passed on" the discriminatory benefits in the form of lower resale prices (Pet. 23 n.4). None of these assertions is valid.

As the Court below found, the summary judgment record contains ample evidence from which causation may be inferred.[29] First, there is the evidence of the discrimination itself, *i.e.*, that in a highly price sensitive industry, over a substantial period of time, plaintiffs' direct competitors were receiving far more favorable Serv prices than were plaintiffs.

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29 Much of the Court's discussion of the causation evidence is contained in the portion of its opinion addressing the "lost sales and profits" prong of the test for competitive injury. (Pet. App. 22a-27a, 909 F.2d at 1535-38). Essentially, the evidence necessary to establish this prong of the competitive injury test is the same as that used to establish actual injury under *Truett Payne*.

Second, contrary to petitioners' assertions, there is ample evidence that the benefits of the discrimination were passed on by the favored competitors in the form of lower resale prices.[30] Third, actual injury caused by the discrimination is evidenced by the voluminous salesmen and customer testimony of specific instances of lost sales or reduced margins due to lower prices being offered by favored competitors, including customers who expressly testified that this was the reason plaintiffs had lost their business. *See supra* pp. 3-4. Finally, additional evidence of injury was provided by the statistical analyses and expert testimony prepared by plaintiffs' expert economist, Dr. Larner, which further showed lost sales and profits caused by Serv's discrimination. *See supra* pp. 7-8.

3. While petitioners suggest that there may have been causes other than Serv's discrimination for plaintiffs' injuries (*see* Pet. 22, 23, nn.36, 37), it has presented no evidence of such causes and no basis for asserting that the Court of Appeals' consideration of this issue was inconsistent with the standards established by this Court. Indeed, even if petitioners had adduced evidence of other possible causes for plaintiffs' injuries, that would only be grist for the jury. *See Perkins* v. *Standard Oil*, 395 U.S. 642, 648 (1969) ("If there is sufficient evidence in the record to support an inference of

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30 As noted by the Court below, the record contains probative evidence of instances in which favored competitor Weis sold Serv products in competition with plaintiffs at prices even below plaintiffs' costs (Pet. App. 24a, 909 F.2d at 1536; *see also* Layton Dep. A.VI-3398-99; Tighe Dep. A.VI-3507-08; Bowman Dep. A.VI-3311-13). Moreover, the undisputed facts that the institutional food distribution business is highly competitive and that customers for portion control products are very sensitive to price alone support an inference that lower prices were passed on to customers. But if that weren't enough, this inference is confirmed by the testimony of Weis's General Manager, Steven Bowers, that Weis passed on whatever rebates or allowances it received (Pet. App. 30a n.15, 909 F.2d at 1539 n.15; Bowers Dep. A.VII-3727-28), and by plaintiffs' expert's comparison and analysis of the purchase and resale pricing documents from plaintiffs and Weis showing that lower Serv prices were in fact passed on in significant part by Weis. (Pet. App. 30a n.15, 909 F.2d at 1539 n.15).

causation, the ultimate conclusion as to what the evidence proves is for the jury"); *see also Hasbrouck* v. *Texaco, Inc.*, 842 F.2d at 1042 ("While a defendant may introduce evidence of alternative causes of the injury, such evidence constitutes only part of the information the jury may consider in determining whether price discrimination was or was not a material cause").

4. Petitioners point to their "undisputed evidence" that plaintiffs' business prospered during the discrimination period as somehow conclusively negating plaintiffs' evidence of injury. (*See* Pet. 3-4, and Pet. App. 92a-93a). Not only is petitioners' "uncontested evidence" on this point based upon the inadmissible and vigorously contested testimony of its purported expert, Mr. Karas, but, as previously discussed, under *Morton Salt*, such evidence is of no relevance. For, where the products in which the discrimination occurred constituted only a small part of plaintiffs' business (salt sold to grocers in *Morton Salt*, portion control products sold to institutional food distributors here), the overall success and growth of plaintiffs' business is at best of marginal relevance in determining whether they were injured with respect to the products in which the discrimination occurred.[31]

5. Finally, petitioners' citation to *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) is wholly misplaced. (Pet. 28-29). Petitioners argue that their contested evidence of plaintiffs' overall business success during the discrimination period leaves the record "ambiguous" and, therefore, under the *Matsushita* rationale, incapable of supporting an inference that plaintiffs were injured. This is

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31 Petitioners seek to sow confusion where there is none by arguing that the Court below improperly relied on the same evidence to infer causation and injury as it had in inferring a violation of the statute. Petitioners' theory is unsupported and illogical. In secondary line price discrimination cases such as this, the evidence showing the underlying violation will necessarily also be relevant to supporting an inference of injury caused by the discrimination. For example, where, as here, plaintiffs have proven lost sales and profits in part through direct evidence, proof of the violation may also be shown by such evidence plus evidence of discrimination.

absurd. As discussed above, plaintiffs' overall business growth is of little, if any, relevance to the Section 4 injury which plaintiffs have suffered here. Moreover, the holding of *Matsushita*, which cautioned against inferring a Sherman Act conspiracy from "ambiguous" evidence that may also support an inference of independent action, obviously has no application to a Robinson-Patman Act claim, in which the issue of conspiracy is not even raised. The decision below is not inconsistent with *Matsushita*, on which it expressly relies.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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